

1989

# Sherry Diane Barton Harrison v. Frank Merrill Harrison : Brief of Appellant

Utah Court of Appeals

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## Recommended Citation

Brief of Appellant, *Harrison v. Harrison*, No. 890616 (Utah Court of Appeals, 1989).  
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DOCKET NO.

890616-CA

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IN THE UTAH COURT OF APPEALS

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SHERRY DIANE BARTON HARRISON, )

Plaintiff-Respondent, )

vs. )

FRANK MERRILL HARRISON, )

Defendant-Appellant. )

Case No. 890616-CA

Classification Priority 7

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BRIEF OF APPELLANT

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Appeal from a Decree of Divorce of the Fifth District Court of Iron County, State of Utah, following a trial to the Domestic Relations Commissioner. Also an appeal from an Order Overruling and Denying Objection to Findings of Fact and Conclusions of Law and Decree of Divorce.

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Clerk of the  
Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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SHERRY DIANE BARTON HARRISON,	)	
	)	
Plaintiff-Respondent,	)	
	)	Case No. 890616-CA
vs.	)	
	)	
FRANK MERRILL HARRISON,	)	
	)	
Defendant-Appellant.	)	

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JURISDICTION OF THE COURT OF APPEALS

The Jurisdiction of the Court of Appeals is established by 76-2a-3(2)(h), Utah Code Annotated, 1953, as amended.

NATURE OF THE PROCEEDINGS

This is an appeal from an order overruling and denying objections to Findings of Fact and Conclusions of Law and Decree of Divorce and a final Judgment and Decree of Divorce of the Fifth District Court of Iron County, State of Utah, entered by the Domestic Relations Commissioner, the Honorable Marlynn B. Lema, presiding.

ISSUES PRESENTED ON APPEAL

Was there sufficient evidence before the court to support the award of the custody of the minor child of the parties to the Plaintiff? Did the District Court properly deny objections to the Findings of Fact and Conclusions of Law and Decree of Divorce signed by the Domestic Relations Commissioner and objected to by the Defendant and therefor deny the Defendant a de novo hearing.

### DETERMINATIVE STATUTES OR RULES

The statutes which are believed to be determinative in this case are 30-3-4.1, 30-3-4.2, 30-3-4.3, and 30-3-4.4, all Utah Code Annotated, 1953, as amended. The Rule which is believed to be determinative in this matter is Rule 6-401 of the Utah Rules of Judicial Administration. The statutes and rule are reproduced in the Addendum to this Brief.

### NATURE OF THE CASE

This is an appeal from an order overruling and denying the Defendant's objections to Findings of Fact and Conclusions of Law and Decree of Divorce and therefor denying the Defendant a de novo hearing on a ruling made by a Domestic Relations Commissioner in a divorce matter. The appeal is also from the order of the Domestic Relations Commissioner awarding custody of the minor child to the Plaintiff mother.

### COURSE OF THE PROCEEDINGS

This divorce action was filed on or about May 9, 1988. (R.1) The case was tried to the Domestic Relations Commissioner, the Honorable Marlynn B. Lema, on July 19, 1989. (R.78) The Domestic Relations Commissioner did not make recommendations in open court, but took the matter under advisement. (R.80) A Memorandum Decision was dated July 21, 1989, and was filed with the clerk of the court on July 26, 1989. (R.86) Findings of Fact and Conclusions of Law and Decree of Divorce were signed by the Domestic Relations Commissioner on August 28, 1989, and were filed on September 8, 1989. (R.106-120)

On September 14, 1989, six days after the Findings of Fact and Conclusions of Law and Decree of Divorce were filed with the clerk of the court, the Defendant filed Objections to Findings of Fact and Conclusions of Law and Decree of Divorce and Request for De Novo Hearing. (R.126) The objections were primarily based upon the award of care, custody, and control of the minor child of the parties to the Plaintiff and the award of occupancy of the home of the parties where the child resides.

#### DISPOSITION AT TRIAL COURT

The trial court entered an order overruling and denying the Objections to Findings of Fact and Conclusions of Law and Decree of Divorce and Request for De Novo Hearing. (R.135-138) This appeal was taken from that order and also taken from the Findings of Fact and Conclusions of Law and Decree of Divorce. (R.138)

#### STATEMENT OF FACTS

The parties were married on September 29, 1962, in St. George, Utah. (R.107) There were three children born to the marriage; but at the time of the divorce, only the youngest son, born August 11, 1976, was still a minor. (R.107) During the marriage the parties acquired a home in Cedar City, Utah, as well as numerous other articles of personal property. (R.107) In the divorce action, home studies were ordered; (R.68-69) and during the home studies, the child of the parties, who was at that time twelve years of age, placed very strong emphasis upon the fact that he wished to reside with his father. The child also



informed the Domestic Relations Commissioner that he wished to reside with his father. (R.88) Despite a specific finding that the minor has expressed a desire to live with the Defendant because of the comradery that they share, the care, custody and control of the minor child was awarded to the Plaintiff. (Findings of Fact No. 9 and No. 12 in the findings of Fact and Conclusions of Law) (R.108-109)

#### SUMMARY OF ARGUMENT

The District Court should grant a de novo hearing on the issue of custody of the minor child and possession of the home of the parties. Custody of the minor child should be awarded to the Defendant/Appellant.

#### ARGUMENT

##### POINT I

UNDER PARAGRAPH 4 OF RULE 6-401 OF THE UTAH RULES OF JUDICIAL ADMINISTRATION, DOMESTIC RELATIONS COMMISSIONERS SHALL NOT MAKE FINAL ADJUDICATIONS OF DOMESTIC RELATIONS MATTERS OTHER THAN DEFAULT DIVORCES TAKEN WITH THE CONSENT OF THE PARTIES.

In this particular case, the Findings of Fact and Conclusions of Law and Decree of Divorce signed by the Domestic Relations Commissioner still exist as the outstanding final adjudication of the District Court in this matter. An objection was made to these findings and conclusions and a request for a de novo hearing was also made. (R.126) However, at the present time, the Findings of Fact and Conclusions of Law and Decree of Divorce signed by the Domestic Relations commissioner are the only pleadings adjudicating the issues between the parties,

especially this most important issue of custody of the minor child. Because of the objection of the Defendant to the Findings of Fact and Conclusions of Law and Decree of Divorce and the provisions within the code which requires a de novo hearing upon such objections, the order of the trial court overruling and denying the objections and request for de novo hearing should be stricken and the case should be remanded to the trial court for hearing of the objections and the de novo hearing provided by statute.

It should be pointed out that nowhere in 30-3-4.1, 30-3-4.2, 30-3-4.3, or 30-3-4.4, all Utah Code Annotated, 1953, as amended, is there any authority in the Domestic Relations Commissioner to execute and enter a final Decree of Divorce. This power is reserved in the District Court Judges. This limitation of the powers of the Domestic Relations commissioner has been clearly recognized in the Rules of Judicial Administration when it is established, in Rule 6-401, that the Commissioner cannot make final judgments. A Commissioner can only make recommendations to the District Judge.

This Defendant/Appellant takes the position that the pleadings in the record entitled "Findings of Fact and Conclusions of Law" and "Decree of Divorce" can only be seen as the recommendations of the Commissioner. There is no final order from the District Court Judge. Since the Defendant/Appellant's objection was filed within ten days of the filing of the "Findings of Fact and Conclusions of Law" and "Decree of

Diverce", the de novo hearing should have been granted.

POINT TWO

THE AWARD OF THE MINOR CHILD OF THE PARTIES TO THE PLAINTIFF HAS BEEN APPROPRIATELY OBJECTED TO AND IS NOT CONSENTED TO BY THE DEFENDANT. HOWEVER, SUCH AWARD STILL REMAINS OUTSTANDING IN DIRECT CONTROVENTION OF THE PROVISION OF RULE 6-401 OF THE UTAH RULES OF JUDICIAL ADMINISTRATION.

In the Domestic Relations commissioner's own Findings of Fact, she determined that there was a "comradery" between the father and son in this matter. The Domestic Relations Commissioner also noted that because of the Defendant's work that the child might be required to spend long hours at night alone.

The young man in question was twelve years of age at the time of the trial and turned 13 shortly thereafter. Apparently, from the findings, the desires of the child were ignored because of the Domestic Relations Commissioners determination that the child might be alone while the Defendant was working, and the Plaintiff would be able to care for the child during the nighttime hours. However, the Domestic Relations Commissioner in Finding No. 6 of the Findings of Fact and Conclusion of Law also determined that "The Plaintiff suffers from multiple-sclerosis which, among other things, has affected her eyesight, rendering her temporarily legally blind. The Plaintiff's visual problems may be corrected by surgery, but she is presently unable to work. The Plaintiff is planning to take rehabilitative training. She is capable of maintaining her household duties despite her handicap." The Defendant specifically questions the basis of awarding the child to the

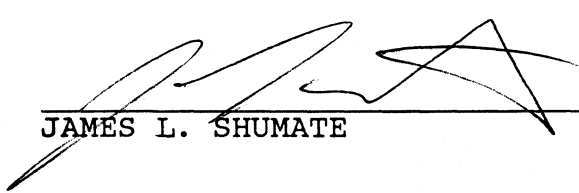
Plaintiff which appears solely to be based upon the child's being alone during nighttime hours. If the Plaintiff is disabled to the point that she cannot work and also receives SSI income, (R.108, Finding of Fact No. 7) it strains credulity that the child will be better cared for by a disabled mother than allowed to be otherwise cared for while his fully able and capable father, with whom he prefers to stay, is working.

The writer of the Brief fully understands that the court may be bound by the Findings of Fact made by the Domestic Relations Commissioner when there is no transcript of the proceedings provided. The Defendant does not have sufficient funds to pay for a transcript, and thus is required to only cite the Findings of Fact and Conclusion of Law. However, those Findings of Fact seem, on their face, to be contradictory to the award of custody made by the Domestic Relations Commissioner.

#### CONCLUSION

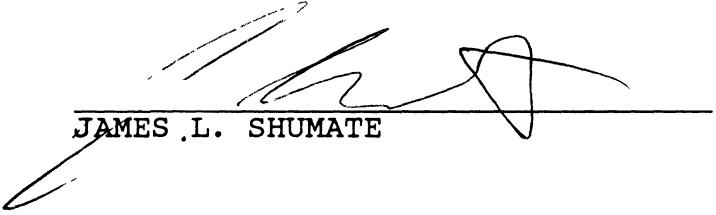
For the reasons set forth above, the Defendant specifically requests that this matter be remanded to the District Court with orders to conduct the de novo hearing on the issues of child custody and possession of the home.

DATED this 12<sup>th</sup> day of January, 1990.

  
\_\_\_\_\_  
JAMES L. SHUMATE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the above and foregoing BRIEF OF APPELLANT to Mr. Willard R. Bishop, Attorney at Law, P.O. Box 279, Cedar City, Utah 84720, this 12<sup>th</sup> day of January, 1990, first class postage fully prepaid.



JAMES L. SHUMATE

**Rule 6-401 Domestic relations commissioners,  
Intent**

To identify the types of cases and matters which Commissioners are authorized to hear to identify the types of relief which Commissioners may recommend and to identify the types of final orders which may be issued by Commissioners

To establish a procedure for judicial review of Commissioners' decisions

**Applicability**

This rule shall govern all Domestic Relations Court Commissioners sitting in the District Courts

**Statement of the Rule**

(1) **Types of cases and matters** All domestic relations matters filed in the District Court in counties where Domestic Relations Commissioners are appointed and serving, including orders to show cause, pretrial conferences, petitions to modify divorce decrees, scheduling conferences, and all other applications for relief except motions for temporary restraining orders, shall be referred to the commissioner upon filing with the clerk of the court unless otherwise ordered by the Presiding Judge of the District

**(2) Relief which may be granted**

(A) The commissioner shall have the authority to grant relief as set forth in Utah Code Ann. Sections 30-3-4.2, 30-3-4.3 and 30-3-4.4

(B) The commissioner shall have the authority to sign orders consistent with paragraph (1) above

(C) The commissioner shall have the authority to sign orders directing state agencies or private professionals to conduct evaluations and home studies

(D) The commissioner may recommend entry of default or sanctions against a party failing to conform with the commissioner's requirement of attendance or production of documents

(E) The commissioner's recommendation shall constitute the order of the court without hearing unless objections to the recommendations are filed within ten days of the date the recommended order was made in open court or, if taken under advisement, the date of the subsequent written recommendation made by the commissioner. Any party objecting to such recommended order shall file with the clerk a written objection to the recommendation, and serve copies of the objection on the commissioner's office and opposing counsel. Objections must be to specific recommendations and shall set forth detailed reasons for each objection. In any event, the recommendation shall be effective until such time as the court modifies it.

(3) **Judicial review** When a matter is brought before the court by objection to the commissioner's recommendation or certification by the commissioner, the court will grant a de novo hearing on the record of those issues specifically objected to by the parties or certified by the commissioner.

**(4) Prohibitions.**

(A) Commissioners shall not make final adjudications of domestic relations matters other than default divorces taken with the consent of the parties.

(B) Commissioners shall not serve as pro tempore judges in any matter, except as provided by Rule of the Supreme Court.

### 30-3-4.1. Appointment of commissioner.

(1) The Judicial Council shall, as considered necessary and as funded by the Legislature, appoint an attorney of recognized ability and standing at the bar or a circuit court judge to serve as court commissioner.

(2) (a) Court commissioners appointed under this section may serve in one or more judicial districts as designated by the Judicial Council

(b) Salaries of persons appointed under this section shall be fixed within budgetary limitations. 1989

### 30-3-4.2. Authority of commissioner.

In matters of divorce, annulment, separate maintenance, child custody, or spouse abuse the court commissioner may

(1) upon notice require the personal appearance of parties and their counsel,

(2) require the filing of financial disclosure statements and proposed settlement forms by the parties;

(3) obtain child custody evaluations from the Division of Family Services under Section 62A-4-106 or the private sector,

(4) make recommendations to the court regarding any issue in domestic relations and spouse abuse cases at any stage of proceedings,

(5) keep records, compile statistics, and make reports as the courts may direct,

(6) require counsel for the parties to file with the initial or responsive pleadings a certificate based upon the facts available at that time if there is:

(a) an issue of child custody anticipated,

(b) a significant financial or property issue to be adjudicated, or

(c) legal action pending or previously adjudicated in a district court or a juvenile court of any state regarding the minor child in the current case;

(7) conduct evidentiary hearings in contested divorce or spouse abuse matters and make recommendations to the district court for entry of an order;

(8) adjudicate default divorces,

(9) enter a default judgment against any party who fails to comply with the commissioner's requirements of attendance or production of documents;

(10) impose sanctions against any person who acts in contempt of the commissioner under Section 78-32-10,

(11) issue temporary or ex parte orders, and

(12) adjudicate contested divorces only upon appointment as judge pro tempore in accordance with the rules of the Supreme Court. 1989

### 30-3-4.3. Duties of commissioner.

Under the general supervision of the presiding judge and within the policies established by the Judicial Council, the court commissioner has the following duties prior to any matters of divorce, annulment, separate maintenance, child custody, or spouse abuse coming before the district court.

(1) review all pleadings in each case;

(2) certify those cases directly to the court that do not appear to require further intervention by the commissioner;

(3) conduct hearings with parties and their counsel present, except those previously certified to the court for the purpose of submitting recommendations to the court;

(4) provide any other information or assistance to the parties as appropriate,

(5) coordinate information with the juvenile court regarding previous or pending proceedings involving children of the parties and

(6) refer appropriate cases to mediation programs if available. 1989

### 30-3-4.4. Jurisdiction of commissioner — Effect of commissioner's recommendation — Objections — Referral of cases to court

(1) All domestic relations matters including orders to show cause, pretrial conferences, petitions for modification of a divorce decree, scheduling conferences, and all other applications for relief except ex parte motions, shall be referred to the court commissioner before any hearing may be scheduled before the district court judge unless otherwise ordered

(2) (a) The court commissioner shall, after hearing any motion or other application for relief, recommend entry of an order and shall make a written recommendation as to each matter heard

(b) The commissioner's recommendation has the effect of an order of the court until it is modified by the court.

(3) (a) Any party objecting to the recommended order shall file a written objection to the recommendations and serve copies of the objections to the commissioner's office and opposing counsel.

(b) Objections shall be filed within ten days of the date the recommendation was made in open court or if taken under advisement, ten days after the date of the subsequent written recommendation made by the commissioner as provided by the Utah Rules of Civil Procedure

(c) Objections shall be to specific recommendations and shall set forth reasons for the objections.

(4) The commissioner shall then refer the matter to a district judge for review of matter specifically objected to by the parties or certified by the commissioner.

(5) If no objection or request for review is made within ten days, the party is considered to have consented to entry of an order in conformance with the commissioner's recommendation. 1989